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In the Supreme Court of the United States

TIMOTHY DANIELS AND F/V MISS JENNA, LLC,
PETITIONERS

v.

FRANCIS PATENAUDE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether fishing privileges that are granted to vessels under the Magnuson-Stevens Fishery Conservation and Management Act, 16 U.S.C. 1801 (1994 & Supp. V 1999), and regulations thereunder, are appurtenances of the vessel and thus subject to a maritime lien against the vessel.

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In the Supreme Court of the United States

No. 01-0126

TIMOTHY DANIELS AND F/V MISS JENNA, LLC,
PETITIONERS

v.

FRANCIS PATENAUDE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinions of the court of appeals (Pet. App. 1-2) and the district court (Pet. App. 3-5) are not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on April 20, 2001. The petition for a writ of certiorari was filed on July 19, 2001. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Magnuson-Stevens Fishery Conservation and Management Act (Act), 16 U.S.C. 1811(a), declares the "sovereign rights and exclusive fishery management authority" of the United States within a extending from 3 to 200 miles from the Nation's coasts. The Act assigns to the Secretary of Commerce (Secretary) the authority to manage and conserve coastal fisheries, and provides for a comprehensive program for the management of our Nation's fisheries. See 18 U.S.C. 1811; 16 U.S.C. 1851, 1861 (1994 & Supp. V 1999). The National Marine Fisheries Service (NMFS) is the principal component of the Department of Commerce charged with implementing the Act.

The Act authorizes regional fishery management councils or the Secretary to allocate fishing privileges. 16 U.S.C. 1852(a), 1853(b)(6) (1994 & Supp. V 1999). Regional councils may allocate fishing privileges "by licensing of vessels, gear, or fishermen." 50 C.F.R. 600.330(c)(1). In the multispecies and scallop fisheries subject to the permit involved in this case, permit eligibility is based on an initial showing that a vessel has met specific permit and fishing history requirements, and that the permit has been renewed each year since its initial issuance. 50 C.F.R. 650.4, Pt. 651 (1994). A vessel is not eligible for a multispecies permit unless it was issued such a permit in the preceding year or replaced a vessel that was issued such a permit (or was issued a confirmation of permit history). 50 C.F.R. 648.4(a)(1)(i).

When a vessel is "bought, sold, or otherwise transferred," "[t]he fishing and permit history of a vessel is presumed to transfer with the vessel * * * unless there is a written agreement, signed by the transferor/

seller and transferee/buyer, or other credible written evidence, verifying that the transferor/seller is retaining the vessel's fishing and permit history for purposes of replacing the vessel." 50 C.F.R. 648.4(a)(1)(i)(D). The fishing permit itself, however, is "valid only for the fishing vessel, owner and/or person for which it is issued," and "is not transferable or assignable." 50 C.F.R. 648.4(k). Thus, upon transfer, the new owner must apply for a new permit based upon the vessel's fishing history and permit eligibility.

Once a permit is issued, NMFS retains the power to suspend, revoke, or modify a permitee's fishing privileges. See 16 U.S.C. 1858(g) (1994 & Supp. V 1999); 50 C.F.R. 600.740(c); 50 C.F.R. 648.4(m); 15 C.F.R. 904.301. Federal fishing privileges are subject on a continuing basis to federal regulatory requirements. 50 C.F.R. 648.4(b).

2. A maritime lien is a privileged claim on a vessel or other maritime property that typically arises due to a vessel owner's failure to fulfill contractual obligations, or injuries caused by a vessel. Thomas J. Schoenbaum, *Admiralty and Maritime Law* § 9-1, at 496 (2001 ed.) [hereinafter Schoenbaum]. The lien may attach not only to the vessel itself, but also to the vessel's appurtenances and equipment, as well as to its cargo, freights, and subfreights. *Id.* at 501; see *Piedmont & Georges Creek Coal Co.* v. *Seaboard Fisheries Co.*, 254 U.S. 1, 9 (1920). The lien stays with the maritime property to which it has attached, and is not extinguished by transfer of ownership in the property, "even to a good faith purchaser." Schoenbaum § 9-1, at 497.

Maritime liens may arise under general admiralty law or statute. The Commercial Instruments and Maritime Liens Act (the successor statute to the Federal Maritime Lien Act) provides that "a person providing

necessaries to a vessel on the order of the owner or a person authorized by the owner—(1) has a maritime lien on the vessel; (2) may bring a civil action in rem to enforce the lien; and (3) is not required to allege or prove in the action that credit was given to the vessel." 46 U.S.C. 31342(a).

Rule C(1)(a) the Supplemental Rules for Certain Admiralty and Maritime Claims (Supplemental Rules) provides that an action in rem may be brought in federal court "[t]o enforce any maritime lien." Once the court makes an initial determination that an in rem action is proper, "the court must issue an order directing the clerk to issue a warrant for the arrest of the vessel or other property that is the subject of the action." Rule C(3)(a)(ii)(A). "If the property that is the subject of the action consists in whole or in part of freight, the proceeds of property sold, or other intangible property, the clerk must issue * * * a summons directing any person controlling the property to show cause why it should not be deposited in court to abide the judgment." Rule C(3)(c).

3. On August 11, 1998, petitioner Miss Jenna, LLC purchased the fishing vessel *F/V Weymouth*. At the time of the sale, the *F/V Weymouth* had posted on board an NMFS fishing permit for scallops and summer flounder. The permit was referenced in the purchase and sale agreement, and petitioners had a "clear understanding and intent that the fishing history and fishing rights conferred by [the permit] were included with the sale of the *FV Weymouth*." Pet. App. 29; see *id.* at 29-30.[1] After the sale, petitioners changed the name of the vessel to the *F/V Miss Jenna*.

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[1] The permit was not valid at the time of the sale, because the previous owners had been sanctioned by NMFS. But upon trans-

On November 17, 1998, respondent Francis Patenaude filed an in rem action against the *F/V Miss Jenna* in the United States District Court for the District of Massachusetts, seeking to enforce a maritime lien for supplies that he had allegedly provided to the vessel before its sale to Miss Jenna, LLC. Pet. App. 29. Pursuant to an order of the district court, United States Marshals seized the *F/V Miss Jenna* in New Bedford, Massachusetts, where she has remained under arrest. *Id.* at 29-30. The fishing permit was posted on board the vessel at the time of the arrest. *Id.* at 30.

On December 8, 1998, petitioner Timothy Daniels applied to NMFS pursuant to 50 C.F.R. 648.4 (1998), to transfer the fishing history and limited access permit eligibility from the *F/V Miss Jenna* to a "replacement" vessel, the *F/V Top Flight.* Daniels was the authorized agent of Miss Jenna, LLC and owned or controlled the *F/V Top Flight.* Pet. App. 30-31. NMFS authorized the requested transfer and issued new fishing permits to the *F/V Top Flight* on January 5, 1999. *Id.* at 31. At the time, the *F/V Miss Jenna* remained under arrest and seizure. *Ibid.*[2]

On January 29, 1999, the district court ruled that Patenaude had valid in rem claims against the *F/V Miss Jenna.* On March 1, 1999, Patenaude purchased the *F/V Miss Jenna* on an "as is, where is" basis at a judicial auction. Pet. App. 31-32. The parties stipulated that Patenaude "assumed that the fishing history and

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fer of the vessel's title to Miss Jenna LLC, NMFS lifted the sanctions and issued a new fishing permit. Pet. App. 33.

[2] NMFS subsequently determined that the *F/V Top Flight* exceeded the maximum permissible length to qualify for a transfer of the fishing history of the *F/V Miss Jenna*, rendering the transfer invalid. Pet. App. 34.

permit eligibility were part of the vessel," but that he had not confirmed that understanding with NMFS and that the court's interlocutory sale order did not refer to the vessel's fishing history or permit eligibility. *Ibid.* After title had passed to Patenaude, he learned from NMFS that the fishing history and permit eligibility previously associated with the vessel had been transferred to the *F/V Top Flight*. *Ibid.*

4. On June 2, 1999, Patenaude filed an amended complaint against Miss Jenna, LLC, and Daniels, as well as NMFS and other federal entities. He sought to invalidate the December 1998 transfer of the fishing history from the *F/V Miss Jenna* to the *F/V Top Flight*, arguing that the fishing history and permit eligibility constituted an appurtenance of the vessel subject to his maritime lien. The federal defendants did not take a position as to whether the court should grant the requested relief, but noted that no precedent established that federal fishing privileges generally are appurtenances of the fishing vessel. Gov't Reply to Mot. for Prelim. Injunction 5.

On July 6, 1999, the district court entered a preliminary injunction in favor of Patenaude and ordered NMFS to invalidate the December 1998 transfer of fishing privileges and restore the fishing history of the vessel pending resolution of the case. Pet. App. 37-40. The district court entered final judgment in favor of Patenaude on October 31, 2000, finding that Patenaude had established a claim of $31,070 in rem against the *F/V Miss Jenna* and her appurtenances. In particular, the court concluded that "the appurtenances * * * transferred in the sale * * * included [the vessel's] fishing history and associated fishing permit, subject to generally applicable regulatory provisions." *Id.* at 4.

Petitioners appealed. While that appeal was pending, the First Circuit decided *Gowen, Inc.* v. *F/V Quality One*, 244 F.3d 64, 67-68 (2001), cert. denied, No. 01-19 (Oct. 1, 2001). In *Gowen*—in which NMFS was not a party—the court held that NMFS fishing permits and fishing histories are appurtenances of the vessel for purposes of an in rem action to enforce a maritime lien, and therefore had properly been included in a judicial sale to satisfy the lien. *Id.* at 68-69. In reaching that conclusion, the court reasoned that federal fishing privileges are "essential to the vessel's navigation, operation, or mission," and should be regarded as an "appurtenance" of the vessel under traditional maritime principles. *Id.* at 67 (internal citation and quotation mark omitted).[3]

Patenaude moved for summary affirmance in this case on the ground that *Gowen* "is controlling," a point that petitioners "concede[d]." Pet. App. 2. The court of appeals granted that motion and summarily affirmed the district court's decision on the basis of its recent *Gowen* decision. *Id.* at 1-2.

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[3] The *Gowen* court rejected an argument based on a 1996 statute providing for the creation of a registry for federal fishing permits, and requiring that security interests in such permits must be recorded to be valid against parties other than the transferor and persons with actual notice. See Sustainable Fisheries Act, Pub. L. No. 104-297, § 110(d), 110 Stat. 3590-3592 (16 U.S.C. 1855(h)). The court noted that the registration requirement does not take effect until NMFS promulgates final regulations creating a registry, which the agency has not yet done, and that the statute provided that security interests existing before the registry was created could be recorded in the registry. 244 F.3d at 69-70.

ARGUMENT

Petitioner urges (Pet. 8) this Court to grant certiorari to decide the "novel and difficult" question whether federal fishing privileges issued to a vessel are appurtenances of the vessel and thus subject to a maritime lien. This Court recently denied certiorari in a case presenting the same question. *F/V Quality One* v. *Gowen, Inc.*, No. 01-19 (Oct. 1, 2001). In the court of appeals, petitioners conceded that *Gowen* is "controlling precedent." Pet. App. 2; see Pet. 8. Because the decision in this case, like the decision in *Gowen*, does not conflict with any decision of this Court or of any other court of appeal, certioari should be denied in this case as well.

1. Petitioners argue (Pet. 9-10) that the court of appeals' decision "is inconsistent with the legislative intent of the Magnuson-Stevens Act" and NMFS regulations implementing that Act insofar as it treats federal fishing privileges as "property" that may be subject to a maritime lien. That is incorrect.

Neither the decision below nor *Gowen* purports to change the nature of federal fishing privileges or create new property rights. Rather, as the court of appeals stated in *Gowen*, the court simply concluded that "no obvious arguments exist against treating [fishing] permits *as subject to* lien." 244 F.3d at 69 (emphasis added). Moreover, nothing in the decision below or in *Gowen* purports to limit the regulatory authority of NMFS, or to grant permit holders (or their creditors) any new or different fishing privileges than those created by the statute or regulations. Fishing privileges that serve as security interests are subject to the same regulatory requirements as privileges that do not; the privileges do not convey a property interest in fish or a fishery or a right to be free of future regulatory

changes. And the district court in this case was careful to note that the sale of the vessel to respondent included the vessel's fishing history and associated fishing permit "subject to generally applicable regulatory provisions." Pet. App. 4.

2. Petitioners claim (Pet. 10) that the decision below "opens a Pandora's box with regard to the application of the Supplemental Admiralty Rules" for attaching or arresting intangible property. In particular, petitioners claim (Pet. 11) that the decision below will allow litigants "to effectively 'tie up' a fishing vessel by attaching or arresting only its intangible fishing privileges pursuant to [Supplemental] Rule E(4)(c)," thereby avoiding jurisdiction and venue requirements for arresting a vessel. That concern is overstated, and in any event provides no basis for granting review in this case—where the vessel was seized and the only question is whether the maritime lien applies to the federal fishing privileges as well as to the vessel itself. *Gowen* also involved a situation in which the maritime lien was asserted against the vessel as well as its appurtenances, including a federal fishing permit. There is no occasion, therefore, to consider whether federal fishing privileges could be attached in the absence of a vessel and, if so, how the Supplemental Rules might operate in that situation.

3. Although we do not believe certiorari is warranted in this case, we do not embrace the reasoning of the court of appeals in *Gowen* to the extent that *Gowen* may be read to establish a broad rule that federal fishing privileges are appurtenances of a vessel and thus subject to any maritime lien on the vessel.

In *Gowen*, the court of appeals applied a test drawn from case law defining an appurtenance as an item "that is essential to the [ship's] navigation, operation, or

mission." *Gowen*, 244 F.3d at 67 (quoting *Gonzalez* v. *M/V Destiny Panama*, 102 F. Supp.2d 1352, 1356 (S.D. Fla. 2000)). Under that approach, appurtenances subject to a maritime lien typically have constituted physical equipment or items on a vessel. See Schoenbaum § 9-1, at 502 (examples of "appurtenance to which a lien on a vessel attaches include a winch and gallowes installed on a fishing boat, fishing stores onboard a whaling ship, cement loading, bagging, and unloading equipment, a refrigerator on a ship carrying meat as cargo, a diving bell and air pump used for pearl fishing, and tanks used to carry oil") (footnotes and citations omitted).

Treating federal fishing privileges as an appurtenance—particularly in an unqualified or categorical fashion—would expand the traditional concept of an appurtenance subject to a maritime lien. This Court and others have held that, because maritime liens are secret and "may operate to the prejudice of prior mortgagees or of purchasers without notice," such liens "will not be extended by construction, analogy, or inference." *Piedmont & Georges Creek Coal Co.* v. *Seaboard Fisheries Co.*, 254 U.S. 1, 12 (1920); see *Osaka Shosen Kaisha* v. *Pacific Export Lumber Co.*, 260 U.S. 490, 499-500 (1923); *Racal Survey U.S.A., Inc.* v. *M/V Count Fleet*, 231 F.3d 183, 192 (5th Cir. 2000). That principle counsels against adoption of any categorical rule treating fishing privileges as appurtenances subject to lien.

Federal fishing privileges are not "essential" to a vessel's navigation or necessarily to its operation, at least as a general matter. Nor are federal fishing privileges always "essential" even to the operation of a fishing vessel in accomplishing its specific mission. Even without such privileges, a vessel may still be free to fish in waters outside the regulatory jurisdiction.

Fishing privileges may increase the economic value of the vessel, but they do not enhance its physical utility to perform its intended purpose. Nor is the regulatory link between fishing privileges and vessels directly analogous to the link between a vessel and its physical equipment, such as its engines or radar equipment. Even in regions such as the Northeast where permit eligibility generally follows the vessel, it does not always do so. A vessel may be transferred without its fishing history; a fishing history can survive a vessel that has sunk; and the new owner of a vessel with a fishing history must still apply for a new permit. 50 C.F.R. 648.4(a)(1)(i).

In addition, many types of federal fishing privileges are not restricted to a particular vessel. For example, in the Pacific groundfish fisheries, permits are issued directly to vessel owners, rather than to vessels. 50 C.F.R. 660.333. A permit enables a fisherman to catch a specific amount of fish in a single fishing trip. Although in most cases fishermen use their own vessels, permits are not vessel-specific and can be leased to other fishermen. Individual fishing quotas allocate distinct portions of the total available catch of harvestable fish to particular fishermen but are often freely transferable. 50 C.F.R. 679.42 (Alaska halibut and sablefish fisheries). Although fishermen still require a permit to participate in the halibut or sablefish fishery, fishermen may fish from any vessel that meets the specifications written into their permits. A privilege that can be exercised in connection with different vessels is difficult to characterize as "appurtenant" to a particular vessel. It is not apparent, moreover, that fishing privileges should be deemed to be "appurtenant," or not, based on the mechanics of a particular region's permit scheme.

United States v. *Freights, etc., of S.S. Mount Shasta*, 274 U.S. 466 (1927), relied upon by the court of appeals in *Gowen*, 244 F.3d at 68, does not compel the conclusion that fishing privileges are appurtenances subject to a maritime lien. *Mount Shasta* held that a district court sitting in admiralty had jurisdiction to enforce a lien against subfreights that were created by a contract between the owner of the vessel (the United States) and a bareboat charter party and that were "admitted to be due and payable." 274 U.S. at 469-470. The Court characterized the subfreights as "a debt," or "right of the creditor's," that is "capable of being attached." *Id.* at 470. The Court did not hold that the subfreights were appurtenances of the vessel, and subject to a lien on that basis.

The *Gowen* court observed that treating fishing privileges as appurtenances of a vessel would assist fishermen in providing the "secured credit that is often necessary to ensure that a vessel can obtain the basic supplies and services needed for its operation." 244 F. 3d at 68; see Pet. App. 23. The paucity of case law on the question presented, however, suggests that there is no widespread practice of attempting to assert maritime liens covering fishing privileges. And fishermen who wish to pledge their fishing privileges as security may do so by contract or by recording a security interest in the privileges under state commercial law. Indeed, recent legislation directing NMFS to establish a registry for fishing permits—which is not yet in place—specifically provides for the recording of security interests in federal fishing permits. 16 U.S.C.

1855(h)(4) (Supp. V 1999); see *Gowen*, 244 F.3d at 69-70.[4]

4. Despite our disagreement with the breadth of the reasoning of the court of appeals in *Gowen*, we do not believe that this Court's review is warranted in this case, especially since the Court has denied review in *Gowen* itself. *Gowen* is the first reported decision in any court of appeals directly to address whether federal fishing privileges are appurtenant to a vessel and thus subject to a maritime lien. See Pet. 8 (question presented is one of "first impression"). There is no conflict of authority warranting this Court's review and, thus, no disruption in the uniformity of federal maritime law. Further consideration of the question presented by the lower courts may help to identify the different commercial contexts in which maritime liens are asserted against federal fishing privileges, as well as the extent to which the various kinds of fishing privileges authorized under federal law appropriately may be characterized as "appurtenances" of a vessel. In addition, the establishment of the national registry system for fishing permits called for by the Sustainable Fisheries Act, Pub. L. No. 104-297, 110 Stat. 3559, and regulations thereunder, may also bear on the ultimate resolution of the question presented.

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[4] NMFS issued an advanced notice of proposed rulemaking in 1997, see 62 Fed. Reg. 10,249, and has held public meetings on its proposed rule since then, 64 Fed. Reg. 12,925 (1999). But the agency has not yet issued a final rule implementing the national registry system.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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